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Ed Fleshman, Keith Morris, A.C. Field,
8 District Attorney Michael Riese, Darren McElfresh
9

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 JOHN GIMBEL,

CASE NO.: C 070113 SBA

13 Plaintiff,

AMENDED NOTICE AND
MEMORANDUM OF POINTS AND
14 vs. AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS
AMENDED COMPLAINT

15 STATE OF CALIFORNIA, DEL
NORTE COUNTY SHERIFF'S
16 DEPARTMENT, JERRY HARWOOD,
BILL STEVEN, GENE McManus,
17 MELANIE BARRY, DANA RENO,
ROBERT BARBER, ED FLESHMAN,
18 CRESCENT CITY POLICE
DEPARTMENT, DOUGLASS PLACK,
19 GREG JOHNSON, JAMES HOLT,
CABLEB CHADWICK, THOMAS
20 BURKE, DEL NORTE DISTRICT
ATTORNEY KEITH MORRIS, AC
21 FIELD, MICHAEL RIESE, DARREN
MCELFRESH, and FRITZ LUDERMAN,

DATE: September 25, 2007
TIME: 1:00 p.m.
CTRM: 3, 3rd Floor

22 Defendants.
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24
25
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NOTICE

PLEASE TAKE NOTICE that on **September 25, 2007, at 1:00 p.m.**, in the above-entitled Court located at 1301 Clay Street, Suite 400S, Oakland, California, Defendants Del Norte County, erroneously named Del Norte County Sheriff's Department, Jerry Harwood, Bill Steven, Gene McManus, Melanie Barry, Robert Barber, Ed Fleshman, Keith Morris, A.C. Field, District Attorney Michael Riese, and Darren McElfresh, separating themselves from all other defendants herein, move the Court for dismissal of plaintiff's amended complaint as to these defendants. The motion is brought pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6) on the ground that the amended complaint fails to state a valid cause of action as to the moving defendants, as set forth below.

1 Defendants Del Norte County, erroneously named Del Norte County Sheriff's
2 Department, Jerry Harwood, Bill Steven, Gene McManus, Melanie Barry, Robert Barber,
3 Ed Fleshman, Keith Morris, A.C. Field, District Attorney Michael Riese, and Darren
4 McElfresh (hereafter the Del Norte County Defendants), separating themselves from all
5 other defendants herein, submit the following as their motion to dismiss plaintiff's
6 amended complaint.

7 For judicial economy and efficiency, the above individual moving defendants have
8 admitted to the following capacities, which they held at all times pertinent to this action.

9 Del Norte County Sheriff Group

- 10 1. Defendant Jerry Harwood was an Investigator with the Del Norte County
11 Sheriff's Department.
- 12 2. Defendant Bill Steven was a Sergeant with the Del Norte County
13 Sheriff's Department.
- 14 3. Defendant Gene McManus was a Sergeant with the Del Norte
15 County Sheriff's Department.
- 16 4. Defendant Melanie Barry was a Deputy with the Del Norte
17 County Sheriff's Department.
- 18 5. Defendant Robert Barber was a Deputy with the Del Norte
19 County Sheriff's Department.
- 20 6. Defendant Ed Fleshman was a Detective with the Del Norte
21 County Sheriff's Department.

22 Del Norte County District Attorney Group

- 23 7. Defendant Keith Morris was a Deputy District Attorney with the
24 Del Norte County District Attorney's office.
- 25 8. Defendant A. C. Field was an Investigator with the Del Norte
26 County District Attorney's office.
9. Defendant Michael Riese was the District Attorney for the
County of Del Norte.
10. Defendant Darren McElfresh was a Deputy District Attorney with
the Del Norte County District Attorney's office.

1 **I. INTRODUCTION**

2 One June 22, 2007, the court entered its order granting defendants' motion to
3 dismiss plaintiff's initial complaint against the Del Norte County Defendants.¹

4 The court concluded 1) that the District Attorney Defendants (Michael Riese,
5 Keith Morris, Darren McElfresh, and A.C. Field) were barred as a matter of law by
6 absolute prosecutorial immunity; 2) that all of the federal claims against the Sheriff
7 Department Defendants (Jerry Harwood, Bill Steven, Gene McManus, Melanie Barry,
8 Robert Barber, and Ed Fleshman) failed to allege sufficient facts to support a claim under
9 42 U.S.C. §1983; 3) that the federal claim against the County of Del Norte was barred for
10 failure to allege facts establishing liability under *Monell v. Dep't of Soc. Servs.*, 436 U.S.
11 658, 691 (1978); and, 4) that all of plaintiff's state law claims were barred for failure to
12 allege sufficient facts to establish compliance with the claims presentation requirements
13 of the California Tort Claims Act.

14 The court also granted plaintiff thirty days from entry of the order to file an
15 amended complaint.

16 On July 12, 2007, plaintiff filed a six-page document entitled "Amended
17 Complaint." In spite of its title, the document fails to set forth any discernable legal
18 claim against any defendant. Instead, this amended pleading consists primarily of
19 language far outside the bounds of human dignity. The bulk of the "amended complaint"
20 is irrelevant and an embarrassment, and these profanities are only an insult to the
21 integrity and dignity of the court. As set forth below, the purported "amended complaint"
22 should be dismissed without leave to amend.

23 **II. ANALYSIS**

24 **A. Applicable Legal Standards**

25
26 ¹ Two separate orders were also entered granting the motions to dismiss filed by the State
of California and Crescent City defendants.

1 Federal Rule of Civil Procedure, Rule 12(b)(6) provides that a defendant may
 2 respond to a complaint by moving to dismiss the complaint for “failure to state a claim
 3 upon which relief can be granted...” For purposes of Rule 12(b)(6), the term “claim” is
 4 defined as “a set of facts which, if established, give rise to one or more enforceable legal
 5 rights.” *Schwarzer, et al.*, Federal Civil Procedure Before Trial, §9:189 (1994), citing
 6 *Goldstein v. North Jersey Trust Co.*, 39 F.R.D. 363, 366 (S.D.N.Y. 1966), *In re Baker*, 66
 7 BR 652, 653 (D. Nev. 1986).

8 A dismissal under Rule 12(b)(6) should be granted when the facts alleged would
 9 not entitle a plaintiff to any form of legal remedy. Thus, a Rule 12(b)(6) dismissal is
 10 proper where there is either “lack of cognizable legal theory” or “the absence of sufficient
 11 facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dept.*, 901
 12 F.2d 696, 699 (9th Cir. 1990); see also, *Conley v. Gibson*, 355 U.S. 421, 445-46 (1957);
 13 *De La Cruz v. Toomey*, 582 F.2d 45, 48 (9th Cir. 1978).

14 Federal Rule of Civil Procedure, Rule 8, provides, in pertinent part that: “A
 15 pleading which sets forth a claim for relief...shall contain 1) a short and plain statement
 16 of the grounds upon which the court’s jurisdiction depends, unless the court already has
 17 jurisdiction and the claim needs no new grounds of jurisdiction to support it; 2) a short
 18 and plain statement of the claim showing that the pleader is entitled to relief; and, 3) a
 19 demand for judgment for the relief the pleader seeks....”
 20

21 **B. Plaintiff’s Purported Amended Complaint Should Be Dismissed**
 22 **Without Leave to Amend As It Fails to Allege Any Cognizable Claim**
 23 **For Relief**

24 In *Haines v. Kerner*, 404 U.S. 519 (1972), the Supreme Court stated that pro se
 25 complaints are held to less stringent standards than formal pleadings drafted by lawyers.
 26 *Id.*, at 520. However, “[p]ro se litigants must follow the same rules of procedure that
 govern other litigants.” *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1986); *Brown v.*

1 *Rumsfeld*, 211 F.R.D. 601, 605 (N.D. Cal. 2002). Moreover, “[a]ll causes of action
 2 alleged in an original complaint which are not alleged in an amended complaint are
 3 waived.” *Id.*; See also, *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981).
 4 This rule applies with equal force to pro se litigants. *King*, 814 F.2d at 567; *Brown*, 211
 5 F.R.D. at 605; *U.S. v. Merrill*, 746 F.2d 458, 465 (9th Cir. 1984).

6 It is manifest that plaintiff’s amended complaint fails to allege facts which, even
 7 under the most liberal standard, would constitute any cognizable claim for relief. In
 8 addition, the complaint utterly fails to meet the liberal notice pleading standard of Rule
 9 8(a). See *Egevancho v. Fisher*, 423 F.3d 347, 352-53 (3rd Cir. 2005) (dismissing
 10 complaint for failure to comply with Rule 8(a)); *Swierkiewicz v. Sorema*, 534 U.S. 506,
 11 514 (2002) (All complaints must satisfy the requirements of Rule 8(a)).

12 Plaintiff’s purported “amended complaint” fails to set forth any basis for this
 13 court’s jurisdiction, fails to set forth any facts whatsoever pertaining to any discernable
 14 federal or state law claim, fails to identify any defendant in the body of the complaint,
 15 other than a passing reference to A.C. Field, and fails to set forth any request for relief.
 16 Instead, the document is merely a profanity-ridden diatribe.²

17 By filing a document which is nothing more than an attack on the integrity of this
 18 court, the plaintiff has forfeited any right to proceed further with this litigation, and the
 19 complaint should be summarily dismissed without leave to amend. See e.g., *Garrett v.*
 20 *Selby Connor Maddux & Janer*, 425 F.3d 836, 839-41 (10th Cir. 2005) (Dismissing
 21 appeal filed by pro se plaintiff, stating: “Plaintiff’s briefs on appeal do little more than
 22 attempt to impugn (without basis) the integrity of the district judge. Such writings are
 23 intolerable, and we will not tolerate them.”); *U.S. v. Shaffer Equipment Co.*, 111 F.3d
 24 450, 461 (4th Cir. 1993) (“Due to the very nature of the court as an institution, it must and
 25

26 ² The documents attached to the amended complaint which consist primarily of e-mails to
 defense counsel, suffer from the same defects.

1 does have an inherent power to impose order, respect, decorum, silence, and compliance
 2 with lawful mandates. This power is organic, without need of a statute or a rule for its
 3 definition, and it is necessary to the exercise of all other powers.”) (*Phillips v. Carey*, 628
 4 F.2d 207, 208 (10th Cir. 1981) (“If the complaint or other pleadings are abusive or contain
 5 offensive language, they may be stricken *sua sponte* under the inherent powers of the
 6 court.”); (*Theriault v. Silber*, 579 F.2d 302 (5th Cir. 1978) (dismissing an appeal with
 7 prejudice because appellant’s notice of appeal contained “vile and insulting references to
 8 the trial judge, stating: “This court simply will not allow liberal pleading rules and pro se
 9 practice to be a vehicle for abusive documents. Our pro se practice is a shield against the
 10 technical requirements of a past age; it is not a sword with which to insult a trial judge.”);
 11 See also, *Carrigan v. California State Legislature*, 263 F.2d 560, 564 (9th Cir. 1959)
 12 (“Perhaps the easiest procedure in this case would be to dismiss the entire appeal as
 13 frivolous, and strike briefs and pleadings filed by appellate...as either scandalous,
 14 impertinent, scurrilous, and/or without relevancy. Undoubtedly such action would be
 15 justified by this court.”)

16 Furthermore, in the order granting the Del Norte County Defendant’s motion to
 17 dismiss, the court directed plaintiff to “file an Amended Complaint to properly allege
 18 claims, if any, against District Attorney Defendants [Michael Riese, Keith Morris, Darren
 19 McElfresh, and A.C. Field]. Plaintiff’s Amended Complaint should allege specific facts
 20 as to how the District Attorney Defendants are not entitled to absolute prosecutorial
 21 immunity.” Plaintiff’s Amended Complaint has failed to comply with this directive and
 22 the District Attorney Defendants are entitled to dismissal based on their absolute
 23 prosecutorial immunity or, at a minimum, qualified immunity. See *Buckley v.*
 24 *Fitzsimmons*, 509 U. S. 259, 272-73 (1993), *Kalina v. Fletcher*, 522 U.S. 119, 122-31
 25 (1997).

26

1 The only Del Norte County Defendant specifically identified in the Amended
 2 Complaint is A.C. Field, an investigator with the Del Norte District Attorney office. The
 3 sole allegation is that A.C. Field failed to include a symbol, a “smiling smiley,” in the
 4 affidavit for search warrant and arrest warrant presented to Judge Weir. (See, Exhibit B to
 5 Declaration of John Gimbel, filed with Amended Complaint). Plaintiff previously alleged
 6 in his initial complaint that Exhibit A to his complaint is an exact copy of his Internet
 7 posting, which includes the *face with sunglasses*. (See, Complaint, Exhibit A). Even
 8 assuming this symbol was not included in the affidavit of A.C. Field, there are no facts
 9 alleged to suggest that the warrant would have been invalidated. In fact, the presence of
 10 sunglasses suggests an underlying sinister motive. Therefore, common sense dictates that
 11 the inclusion of this symbol would only have provided Judge Weir with more evidence to
 12 find probable cause.

13 A facially valid warrant is presumptive evidence of probable cause. *Franks v.*
 14 *Delaware*, 438 U.S.154, 171 (1978). To overcome this presumption of probable cause,
 15 there must be a “substantial showing” that the warrant affiant “intentionally or
 16 recklessly” omitted or misrepresented material facts. *Id*; *Lombardi v. City of El Cajon*,
 17 117 F. 3d 1117, 1123 (9th Cir. 1997). In the case of omitted information, the plaintiff
 18 must make a “substantial showing” that the omitted information was “material” to a
 19 finding of probable cause. *U. S. v. Chavez-Miranda*, 306 F.3d 973, 979 (9th Cir. 2002),
 20 citing *U.S. v. Kiser*, 716 F.2d 1268, 1271 (9th Cir. 1983). The omitted material is
 21 immaterial if, when the omitted facts are inserted into the Affidavit, probable cause
 22 remains. *Id*.

23 In the present case, the plain text of the Internet posting provided an ample basis to
 24 find probable cause. (*Id.*) Plaintiff directed a specific threat to a specific individual, i.e.
 25 Police Chief Plack, as well as other officers in his department. The threat specifically
 26 invokes grave bodily harm or death, e.g., “breeze away to dust the skull of the police

chief,” “make an example of that scum,” and “if any other piggos down at the station give you crap on this or get in your way, then blow their skulls off too.” (Id.) There is nothing equivocal about this language, and the inclusion of a symbol with sunglasses would have done nothing to diminish the seriousness of this threat. For these reasons, it is respectfully submitted that had A.C. Field included this graphic in the affidavit; and, assuming he had the technical ability on his typewriter or computer, it would not have negated the finding of probable cause.

Plaintiff’s “amended complaint” mentions the ultimate reversal of his conviction by an appellate panel consisting of three judges from the superior court of California. (See, Exhibit A to Declaration of John Gimbel, filed with Amended Complaint). The People of the State of California did not file any opposition to this appeal, and the matter was considered only on plaintiff’s opening brief and the record on appeal. (Id., Exhibit A, p.1). There is no discussion in this opinion of the validity of the search and arrest warrants.

Therefore, even construing plaintiff’s “amended complaint” in the best possible light for plaintiff, it fails to state a claim for relief against defendant A.C. Field. Plaintiff has alleged no facts to show that District Attorney investigator A.C. Field intentionally or recklessly omitted a material fact from the affidavit for a search and arrest warrant. Plaintiff fails to allege facts to overcome either the absolute prosecutorial immunity of the District Attorney Defendants or the qualified immunity provided over functions involving administrative and investigatory matters. As is discussed above, plaintiff also has failed to state any claim for relief against any defendant.

In the order granting the Del Norte County Defendant’s motion to dismiss, the court directed plaintiff to “file an Amended Complaint to properly allege claims, if any, against Sheriff Department Defendants. Plaintiff’s Amended Complaint should allege, with specificity, how each Sheriff Department Defendant’s action or inaction deprived

1 him of his constitutional rights.” Plaintiff also failed to comply with this portion of the
2 court’s order. Likewise, plaintiff has not alleged facts showing that the County of Del
3 Norte had a formal policy that amounted to deliberate indifference to Plaintiff’s
4 constitutional rights, which was moving force behind the constitutional violations.
5 Hence, no *Monell* claim is alleged.

6
7 **V. CONCLUSION**

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9 For all of the above-stated reasons, plaintiff’s purported Amended Complaint
10 should be dismissed with prejudice.

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12 DATED: July 27, 2007

MITCHELL, BRISSO, DELANEY & VRIEZE

13 By: 

14 John M. Vrieze

15 William F. Mitchell

16 Attorneys for Defendants
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PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Humboldt, over the age of eighteen years and not a party to or interested in the within entitled cause, my business address is 814 Seventh Street, Eureka, California.

On this date, I served the following documents:

**AMENDED NOTICE AND MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT**

xx

By placing a true copy thereof enclosed in a sealed envelope with first class postage thereon fully prepaid for collection and mailing on this date and at the place shown, to the party(ies) and at the address(es) set forth below. I am readily familiar with this business' practice for collecting and processing documents for mailing. On the same day that documents are placed for collection and mailing, they are deposited in the ordinary course of business with the United States Postal Service at Eureka, California.

By personally delivering a true copy thereof to the party(ies) and at the address(es) as set forth below.

By personally faxing a true copy thereof to the party(ies) and at the facsimile number(s) as set forth below.

I declare under penalty of perjury that the foregoing is true and correct. Executed July 27, 2007, at Eureka, California.


Micalyn Harris

John Gimbel
225 Brevus Street
Crescent City, CA 95531